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IN THE

# Supreme Court of the United States

October Term, 1974

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No. 74-1057

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THE COMMODITY OPTION COMPANY, INC., D. A. HARTNESS, AND JOHN McGINLEY,
Petitioners,

VS.

RUDY BERNHARDT, DR. TERRY COLLINSON, ROBERT FRASER, COL. CHARLES HAIRSTON, DR. JAMES R. KENNEDY, MAX GRINDLE, ROY PRANGLEY, ELMER WOLFE, DR. JIM WORLTON, CHARMAINE BARNEY, RAY FOSTER, JOHN FARADY, H. R. CATEY D/B/A BOZEMAN, CATEY, WYNN CAPERS, MONT S. JOHNSTON, JOHN W. CORLIS, SAM L. JEFERS, DR. IGNACIO QUIJADA, J. I. CARPENTER, & DR. A. H. VAN DERHOR,
Respondents.

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LESTER D. SITTER

R. JERRY BENNETT

Attorneys for Respondents
4045 Templeton Gap Boulevard
Colorado Springs, Colorado 80907

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## JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition except to the extent that the points raised in the Argument portion of this brief affect jurisdiction.

## STATEMENT OF THE CASE

Petitioners' statement of the case is substantially correct.

## ARGUMENT

Respondents would submit to the Court that the Petition should be denied, and in support thereof would ask the Court to consider the following points:

Point One: No Federal Question of Substance Raised. The Supreme Court of Colorado did not rule on the constitutionality of Colorado Rules of Civil Procedure 102 and 103. That Court based its decision instead upon a local directive, operative in only one county in the state, requiring that prejudgment writs of garnishment be issued by a judge, rather than by a clerk as permitted under Rule 103, Colo. R. Civ. P.

Thus the decision of the Supreme Court of Colorado affects a very limited geographic area, and no special or important reason exists for the granting of certiorari by this Court as required by Supreme Court Rule 19. See Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897.

Point Two: Rectification of Alleged Unconstitutional Action. Since the writing of its decision in this case the Supreme Court of Colorado has revised Rule 102, Colo. R. Civ. P., to such an extent that Questions 1 and 2 presented in the Petition have become moot. The complete text of the revised rule is set out in Appendix A of this Brief. The revision provides for, among other things, issuance of a writ of attachment only by a judge (paragraph e), notice to the defendant (paragraph f), and hearing within seven days (paragraph n). Since a validly issued writ of attachment is a prerequisite to the issuance of a writ of garnishment under Rule 103, the revision of Rule 102 effectively also corrects the alleged constitutional defects of Rule 103.

The revision of Rule 102 by the Supreme Court of Colorado thus makes Petitioners' Questions 1 and 2 moot and not subject to review by this Court. Socialist Labor Party v. Gilligan, 406 U.S. 583, 92 S. Ct. 1716, 32 L. Ed. 317; Rice v. Sioux City Cemetery, supra.

Point Three: Question Not Raised in State Court. Petitioners' Question 3 was not presented for consideration by the Supreme Court of Colorado. This question having been neither raised by the Petitioners below nor passed upon by the state court, it cannot be decided by this Court. Tacon v. State of Arizona, 410 U.S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346; Cardinale v. Louisiana, 394 U.S. 437, 89 S. Ct. 1161, 22 L. Ed. 2d 398; Ellis v. Dixon, 349

U.S. 458, 75 S. Ct. 850, 99 L. Ed. 1231.

Point Four: Absence of Finality of Judgment. Finality of the state court judgment is essential to the availability of the remedy of certiorari. Bruce v. Tobin, 245 U.S. 18, 38 S. Ct. 7, 62 L. Ed. 123. The order of the Colorado Supreme Court in this case was a reversal of the trial court's order, and the case was remanded for further proceedings consistent with the Colorado Supreme Court's opinion. (Page 9 of the Petition.) A judgment reversing and remanding a cause for further proceeding is not final and thus cannot be reviewed by this Court. Houston v. Moore, 16 U.S. 433, 3 Wheat. 433, 4 L. Ed. 428; Morgan v. Thompson, 124 F. 203, 59 C.C.A. 672.

## ARGUMENT ON MERITS

The facts of this case exemplify the absolute necessity for some type of immediate, ex parte remedy for use against those debtors who would fraudulently transfer and conceal assets in avoidance of creditors. As long as the debtor has the right to a prompt hearing to determine the likelihood of the validity of the claim against him, both parties have received the protection of the law, while at the same time due process protections are preserved. Respondents submit that the flexible due process analysis reaffirmed by this Court in Mitchell v. W. T. Grant Co. (416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed.2d 406) is the position which

offers the necessary protection to both debtor and creditor, and that the more narrow decision in North Georgia Finishing, Inc., v. DiChem (43 L.W. 4192, 95 S. Ct. 719, 42 L. Ed.2d 751) is a step in the wrong direction.

## CONCLUSION

Respondents feel that the zig-zag pattern of decisions handed down by the Court in Fuentes v. Shevin (407 U.S. 67, 89 S. Ct. 198, 32 L. Ed.2d 556), Mitchel v. W. T. Grant Co., supra, and North Georgia Finishing, Inc., supra, has muddied the water of pre-judgment remedies. It was because of the need for further clarification in this area of the law that Respondents did not, at first, file a Response to the Petition for Certiorari. But because of the four points set out above in this Brief, Respondents respectfully submit that this case is not an appropriate one to assist in such clarification.

Respectfully submitted,

LESTER D. SITTER

R. JERRY BENNETT

Attorneys for Respondents
4045 Templeton Gap Boulevard
Colorado Springs, Colorado
80907

# APPENDIX A

Colo. R. Civ. P. 102, Vol. 1, 1970 Revision repealed and re-enacted as follows:

## RULE 102. ATTACHMENTS

(a) Before Judgment. Any party, at the time of filing a claim, in an action on contract, express or implied, or in an action to recover damages for any tort committed by a nonresident of this state, against the person or property of a resident of this state, or at any time afterward before judgment, may have nonexempt property of the party against whom the claim is asserted (hereinafter defendant), attached by an ex parte order of court in the manner and on the grounds prescribed in this rule, unless the defendant shall give good and sufficient security as required by section (f) of this rule. No ex parte attachments before judgment shall be permitted other than those specified in this rule.

(b) Affidavit. No writ of attachment shall issue unless the party asserting the claim (hereinafter plaintiff), his agent or attorney, or some credible person for him, shall file in the court in which the action is brought an affidavit setting forth that the defendant is indebted to the plaintiff, or that the defendant is liable in damages to the plaintiff for a tort committed by a non-resident of this state against the person or property of a resident of this state, stating the nature and amount of such

indebtedness or claim for damages and setting forth facts showing one or more of the causes of attachment of section (c) of this rule.

(c) Causes. No writ of attachment shall issue unless it be shown by affidavit or testimony in specific factual detail, within the personal knowledge of an affiant or witness, that there is a reasonable probability that any of the following causes exist:

(1) The defendant is a foreign corporation without a certificate of authority to do business in this state.

(2) The defendant has for more than four months been absent from the state, or the whereabouts of the defendant are unknown, or the defendant is a nonresident of this state, and all reasonable efforts to obtain in personam jurisdiction over the defendant have failed. Plaintiff must show what efforts have been made to obtain jurisdiction over the defendant.

(3) The defendant conceals himself or stands in defiance of an officer, so that process of law cannot be served upon him.

(4) The defendant is presently about to remove his property or effects, or a material part thereof, from this state with intent to defraud, delay, or hinder one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(5) The defendant has fraudulently conveyed, transferred, or assigned his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process or execution unavailing if judgment is obtained.

(6) The defendant has fraudulently concealed, removed, or disposed of his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(7) The defendant is presently about to fraudulently convey, transfer, or assign his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(8) The defendant is presently about to fraudulently conceal, remove, or dispose of his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(9) The defendant has departed or is presently about to depart from this state, with the intention of having his property or effects, or a material part thereof, removed from the state.

(d) Plaintiff to Give Bond. Before the issuance of a writ of attachment the

plaintiff shall furnish a written undertaking, by a corporate surety company or by two or more sufficient sureties, in an amount set by the court in its discretion, not exceeding double the amount claimed, to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages defendant may sustain by reason of the wrongful suing out of the attachment. The defendant may require the sureties to satisfy the court that each, for himself, is worth the amount for which he has become surety over and above his just debts and liabilities, in property located in this state and not by law exempt from execution.

(e) Court Issues Writ of Attachment. After the affidavit and bond are filed as aforesaid and testimony had as the court may require, the court may issue a writ of attachment, directed to the sheriff of a specified county, commanding him to attach the lands, tenements, goods, chattels, rights, credits, moneys, and effects of said defendant, of every kind, or so much thereof as will be sufficient to satisfy the claim sworn to, regardless of whose hands or possession in which the same may be found.

(f) Contents of Writ and Notice. The writ shall direct the sheriff to serve a copy of the writ on the defendant if found in the county, and to attach and keep safely all the property

of the defendant within the county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's claim, the amount of which shall be stated in conformity with the affidavit. The writ shall also inform the defendant of his right to traverse and to have a hearing to contest the attachment. If the defendant's property is or may be located in more than one county, additional or alias writs may be issued contemporaneously. If the defendant deposit the amount of money claimed by the plaintiff or give and furnish security by an undertaking, approved by the sheriff, of a corporate surety company or of at least two sureties in an amount sufficient to satisfy such claim, the sheriff shall take such money or undertaking in lieu of the property. Alias writs may issue at any time, to the sheriffs of different counties.

(g) Service; How Made. The writ of attachment shall be served in like manner and under the same conditions as are provided in these rules for the service of process. Service shall be deemed completed upon the expiration of the same period as is provided for service of process.

(h) Execution of Writ. The sheriff to whom the writ is directed and delivered shall execute the same without delay as follows:

(1) Real property standing upon the records of the county in the name of the defendant shall be attached by filing a copy of the writ, together

with a description of the property attached, with the recorder of the county.

(2) Real property, or any interest therein belonging to the defendant, and held by any person, or standing upon the records of the county in the name of any other person but belonging to the defendant, shall be attached by leaving with such person or his agent, if either be found in the county, a copy of the writ and a notice that such real property (giving a description thereof), and any interest therein belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county.

(3) Personal property shall be attached by taking it into custody.

(i) Return of Writ. The sheriff shall return the writ of attachment within 20 days after its receipt, with a certificate of his proceedings endorsed thereon, or attached thereto, making a full inventory of the property attached as a part of his return upon the writ.

(j) Execution of Writ on Sunday or Legal Holiday. If an affidavit or testimony is received stating that it is necessary to execute the writ of attachment on Sunday or on a legal holiday, to secure property sufficient to satisfy the judgment to be obtained, and if the court is so satisfied, the court shall endorse on the writ an order to the officer directing the writ

to be executed on such day.

(k) No Final Judgment Until 30 Days After Levy.

(1) Creditors. No final judgment shall be rendered in a cause wherein an attachment writ has been issued and a levy made thereunder, until the expiration of 30 days after such levy has been made; and any creditor of the defendant making and filing within said 30 day period an affidavit and undertaking, as hereinbefore required of the plaintiff, together with his complaint setting forth his claim against the defendant, shall be made a party plaintiff and have like remedies against the defendant to secure his claim, as the law gives to the original plaintiff.

(2) Judgment Creditors. Any other creditor whose claim has been reduced to judgment in this state may upon motion filed within said 30 days be made a party and have like remedies against the attached property. Such judgment creditor shall not be required to make or file an affidavit, undertaking, complaint, or have summons issue, provided, that any such judgment creditor may be required to prove to the satisfaction of the court that his judgment is bona fide and not in fraud of the rights of other creditors.

(l) Dismissal by One Creditor Does Not Affect Others. After any additional creditor has been made a party to the action, as hereinbefore provided, a

dismissal by the first or any subsequent attaching creditor of his cause of action, or proceedings in attachment, shall not operate as a dismissal of the attachment proceedings as to any other attaching creditor; but the remaining creditors may proceed to final judgment therein the same as though no such dismissal had been made.

(m) Final Judgment Prorated; When Creditors Preferred. The final judgment in said action shall be a several judgment, wherein each creditor named as plaintiff shall have and recover of the defendant the amount of his claim or demand, as found by the court to be due, together with his costs; and the money realized from the attachment proceedings, after paying all costs taxed in the attachment action, shall be paid to the participating creditors in proportion to the amounts of their several judgments; and any surplus moneys, if any, shall be paid to the defendant by order of the court, upon proof thereof. Provided, when the property is attached while the defendant is removing the same or after the same has been removed from the county, and the same is overtaken and returned, or while same is secreted by the defendant, or put out of his hands, for the purpose of defrauding his creditors, the court may allow the creditor or creditors through whose diligence the same shall have been secured a priority over other attachments or judgment creditors.

(n) Traverse of Affidavit.

(1) The defendant may, at any time before trial, by affidavit, traverse and put in issue the matters alleged in the affidavit, testimony, or other evidence upon which the attachment is based and if the plaintiff shall establish the reasonable probability that any one of the causes alleged in the affidavit exists, said attachment shall be sustained, otherwise the same shall be dissolved. A hearing on the defendant's traverse shall be held within seven days from the filing of the traverse and upon no less than two days' notice to the plaintiff. If the debt for which the action is brought is not due and for that reason the attachment is not sustained, the action shall be dismissed; but if the debt is due, but the attachment nevertheless is not sustained, the action may proceed to judgment after the attachment is dissolved, as in other actions where no attachment is issued.

(2) A plaintiff who fails to prevail at the hearing provided by this section is liable to the defendant for any damages sustained as a result of the issuance of process, costs, and reasonable attorney's fees. A claim for damages under this subsection may be brought as a part of the existing action, and the defendant shall be permitted to amend his answer and any counterclaim for this purpose.

(o) Amendment of Affidavit. If at the hearing of issues formed by the traverse it shall appear that the evidence introduced does not prove the cause or causes alleged in the

affidavits, but the evidence does tend to prove another cause of attachment in existence at the time of the issuance of the writ, then on motion the affidavits may be amended to conform to proof the same as pleadings are allowed to be amended in cases of variance.

(p) Intervention; Damages. Any third person claiming any of the property attached, or any lien thereon or interest therein, may intervene under the provisions of rule 24, and in case of a judgment in his favor may also recover such damages as he may have suffered by reason of the attachment of the property.

(q) Perishable Property May Be Sold. Where property taken by writ of execution, attachment, or seized under order of court, is in danager of serious and immediate decay or waste, or likely to depreciate rapidly in value pending the determination of the issues, or, where the keeping of it will be attended with great expense, any party to the action may apply to the court, upon due notice, for a sale thereof, and, thereupon the court may, in its discretion, order the property sold in the manner provided for in said order and the proceeds of said sale shall, thereupon, be deposited with the clerk to abide the further order the court.

(r) Application of Proceeds; Satisfaction of Judgment. If judgment is recovered by the plaintiff or any intervenor, on order of court, all

funds previously deposited with the clerk, or in the hands of the sheriff, shall be first applied thereto. If any balance remain due, execution shall issue and be delivered to the sheriff who shall sell so much of the attached property as may be sufficient to satisfy the judgment. Sales shall be conducted as in cases of sales on execution. If there is a personal judgment and after such sale the same is not satisfied in full, the sheriff shall thereupon collect the balance as upon an execution in other cases.

(s) Balance Due; Surplus. Whenever the judgment shall have been paid, the sheriff, upon demand, shall deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

(t) Procedure When Judgment Is For Defendant. If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales, all money collected by the sheriff, and all the property attached remaining in the sheriff's hands, shall be delivered to the defendant, the writ of attachment shall be discharged, and the property released therefrom.

(u) Defendant May Release Property; Bond. The defendant may at any time before judgment have released to him any money in the hands of the clerk or any property in the hands of the sheriff, by virtue of any writ of attachment, by executing the undertaking

provided by in section (v) of this rule. All the proceeds of sales, all money collected by the sheriff, and all the property attached remaining in the sheriff's hands shall thereupon be released from the attachment and delivered to the defendant upon the delivery and approval of the undertaking.

(v) Conditions of Bond; Liability of Sheriff. Before releasing the attached property to the defendant, the sheriff shall require and approve an undertaking executed by the defendant to the plaintiff either of a corporate surety company or with at least two sureties in such sum as may be fixed by the sheriff in not less than the value of the property, to the effect that in case the plaintiff recover judgment in the action, and the attachment is not dissolved, defendant will, on demand, re-deliver such attached property so released to the proper officer, to be applied to the payment of the judgment, and that in default thereof the defendant and sureties will pay to the plaintiff the full value of the property so released. If a sheriff shall release any property held by him under any writ of attachment without taking a sufficient bond, he and his sureties shall be liable to the plaintiff for the damages sustained thereby.

(w) Application to Discharge Attachment. The defendant may also, at any time before trial, move that the attachment be discharged, on the ground that the writ was improperly issued,

for any reason appearing upon the face of the papers and proceedings in the action. If on such application it shall satisfactorily appear that the writ of attachment was improperly issued, it shall be discharged.

(x) New Bond; When Ordered; Failure to Furnish. If at any time where an attachment has been issued it shall appear to the court that the undertaking is insufficient, the court shall order another undertaking, and if the plaintiff fails to comply with such order within 20 days after the same shall be made, all or any writs of attachment issued therein shall be quashed. The additional undertaking shall be executed in the same manner as the original, and the sureties therein shall be jointly and severally liable with those in the original undertaking.

(y) New Trial; Appeal and Writs of Certiorari. Motions for new trial may be made in the same time and manner, and shall be allowed in attachment proceedings, as in other actions. Appeals from the county court to the district court and writs of certiorari may be taken and prosecuted from any final judgment or order in such proceedings as in other civil cases. Any order by which an attachment is released or sustained is a final judgment.

Repealed and reenacted this 19th day of December, 1974, by the Court En Banc, effective January 1, 1975.